

## **ADVISORY OPINION NO. 2011-18**

**Issued On December 1, 2011 By The**

**WEST VIRGINIA ETHICS COMMISSION**

### **OPINION SOUGHT**

A **State Agency** asks whether members of its governing council who are appointed to represent a particular industry/interest must recuse themselves from consideration of grant applications/awards or legislative rules relating to the award of grants, or both.

### **FACTS RELIED UPON BY THE COMMISSION**

The Requester is a public agency that provides funding for technological infrastructure projects for unserved and underserved areas of the State. The State Agency receives its funding from public sources and private entities, including corporations and individuals.

The State Agency is governed by an eleven-member council. In accordance with its enabling statute, four of the members are State officials or their designees. The remaining seven members are appointed by the Governor. The Requester's enabling statute specifies that the seven appointed members represent various interests and industries throughout the State. In particular, one member must represent higher or secondary education and two members must represent the general public. However, by statutory design, the Legislature intended for the other members to be representatives of industries/interests affected by the Agency.<sup>1</sup>

By having members of affected industries on the governing council, a potential situation is created in which the Industry members may have to vote or discuss matters which could financially affect themselves and/or their employers. In an effort to address this potential situation, the Legislature expressly stated in the enabling statute that members with potential conflicts are not disqualified from membership on the council so long as the member recuses him/herself from participation in the issue giving rise to the conflict in accordance with the recusal statute set forth in the West Virginia Ethics Act. (W.Va. Code § 6B-2-5(j)(3)).

The Requester desires to know whether Industry member participation in the drafting and passage of legislative rules and/or the awarding of grants constitutes a conflict of interest which requires recusal.

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<sup>1</sup> These industry-related council members are collectively referred to as the "Industry members" throughout this opinion.

## **CODE PROVISIONS RELIED UPON BY THE COMMISSION**

W. Va. Code § 6B-2-5(b) reads in relevant part:

A public official or public employee may not knowingly and intentionally use his or her office or the prestige of his or her office for his or her own private gain or that of another person.

. . .

The performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent services, without compensation, does not constitute the use of prestige of office for private gain.

W. Va. Code § 6B-2-5(d) reads in relevant part:

[N]o elected or appointed public official or public employee or member of his or her immediate family or business with which he or she is associated may be a party to or have an interest in the profits or benefits of a contract which the official or employee may have direct authority to enter into, or over which he or she may have control. . . . *Provided, however,* That nothing herein shall be construed to prohibit . . . a part-time appointed public official from entering into a contract which the part-time appointed public official may have direct authority to enter into or over which he or she may have control when the official has not participated in the review or evaluation thereof, has been recused from deciding or evaluating and has been excused from voting on the contract and has fully disclosed the extent of his or her interest in the contract.

W. Va. Code § 6B-2-5(j) reads in relevant part:

(j) *Limitations on Voting.*

(1) Public officials . . . may not vote on a matter:

(A) In which they, an immediate family member, or a business with which they or an immediate family member is associated have a financial interest. Business with which they are associated means a business of which the person or an immediate family member is a director, officer, owner, employee, compensated agent, or holder of stock which constitutes five percent or more of the total outstanding stocks of any class.

(B) If a public official is employed by a financial institution and his or her primary responsibilities include consumer and commercial lending, the public official may not vote on a matter which directly affects the financial interests of a customer of the financial institution if the public official is directly involved in approving a loan request from the person or business appearing before the governmental body or if the public official has been directly involved in approving a loan for that person or business within the past 12 months: *Provided*, That this limitation only applies if the total amount of the loan or loans exceeds fifteen thousand dollars.

. . .

(D) The appropriations of public moneys or the awarding of a contract to a nonprofit corporation if the public official or an immediate family member is employed by the nonprofit.

(II) A public official may vote:

(A) If the public official, his or her spouse, immediate family members or relatives or business with which they are associated are affected as a member of, and to no greater extent than any other member of a profession, occupation, class of persons or class of businesses. A class shall consist of not fewer than five similarly situated persons or businesses; or

(3) For a public official's recusal to be effective, it is necessary to excuse him or herself from participating in the discussion and decision-making process by physically removing him or herself from the room during the period, fully disclosing his or her interests, and recusing him or herself from voting on the issue.

### **ADVISORY OPINION**

In establishing the Ethics Act, the Legislature sought to maintain the public's confidence in the impartiality and independence of decisions and actions by public officials and employees, and to ensure that all such decisions be made free of undue influence, favoritism or threat at all levels of government. W.Va. Code § 6B-1-2(a).

In creating these ethical standards for public officials, the Legislature additionally recognized that "many part-time public officials and public employees serv[e] in elected and appointed capacities; and that certain conflicts of interest are inherent in part-time service[.]" W.Va. Code § 6B-1-2(c).

The question presented in this matter is the application of the prohibitions of the Ethics Act to a legislatively created governing council of part-time appointed community and industry leaders when either they or their employers may have a financial interest in the matters before the Agency.

### **A. Prior Opinions**

The Commission recently addressed a similar issue in Advisory Opinion 2009-08. While in that opinion the Commission declined to create a “bright-line rule” applicable to every legislatively created board, the Commission did outline a procedure to follow for the Requester in that opinion, and “caution[ed] other funding boards to examine their own internal decision-making and deliberative committees.”

In particular, the Commission held in A.O. 2009-08 that Industry members may remain on the board, but may not participate or serve on a committee which initially evaluates grant applications. In reaching this conclusion, the Commission stated:

The significant difference between the [sub-committee] and the full board is that the [sub-committee] makes determinations among all the proposals presented, and recommends only a limited amount of proposals to the Board for approval. Thus, as full board members, it is possible for the representatives to recuse themselves from voting or discussing their constituents’ proposals, but allow participation on non-constituents’ proposals.

The Commission additionally reiterated in A.O. 2009-08 its prior comments in A.O. 2006-06 relating to public officials employed by non-profits, and found the guidance equally applicable to all part-time appointed members who serve on funding boards which may consider funding or grants to their respective industry, employer or organization.

The Commission finds that these opinions create a sound framework for handling the types of conflicts raised in this matter. Therefore, with these prior opinions in mind, the Commission shall address the Requester’s questions.

### **B. Participation in consideration of Grant Awards**

One of the Requester’s statutory missions is to consider and approve grants to various corporations and organizations throughout the State. While the Agency is still determining the structure and procedures for evaluating and awarding grants, the possibility exists that several of the Council members’ employers may apply for grants from the Council. Therefore, the Requester desires guidance as to when, if at all, the appointed Council members (i.e. Industry members) should recuse themselves.

The Commission finds that the model adopted in A.O. 2009-08 provides the best framework to avoid conflicts in considering or approving grant applications.

Accordingly, the Commission finds that the council as a whole should not initially review, evaluate, and/or screen the grant applications. Instead, the Council should appoint staff and/or a separate review committee of Council members to evaluate, screen, and/or make a recommendation to the full board for approval.

However, the Council's Industry members **may not** serve or participate on the review committee which initially evaluates, screens, ranks, and/or makes a recommendation to the full Council. The Industry member **may**, however, participate and vote on approval of the recommended grant application as part of the full Council, so long as the member does not have a specific prohibited financial interest or other conflict necessitating recusal. See W.Va. Code § 6B-2-5(j).

The distinction is that the committee assigned to review grant applications makes determinations among all the applicants, and recommends only a limited amount to the full council for approval. Thus, as full board members, it is possible for the members to recuse themselves from voting or discussing applications in which they or their employers have a financial interest, but allow participation on the merits of other applications in which the member has no financial interest.

With respect to financial interest, the Commission reminds board members that recusal is not mandated in every situation in which a decision may benefit a member or member's employer. Instead, W.Va. Code § 6B-2-5(j)(II) states that a "public official may vote...If the public official, his or her spouse, immediate family members or relatives or business with which they are associated are affected as a member of, and to no greater extent than any other member of a profession, occupation, class of persons or class of businesses." The Ethics Act further states that "a class shall consist of not fewer than five similarly situated persons or businesses." W.Va. Code § 6B-2-5(j)(II)(A).

Therefore, if the member or member's employer is one of a class of 5 or more similarly situated business, and is not going to uniquely benefit from the decision, then recusal is not mandated. However, the Commission still cautions members about the prohibitions of use of public office for private gain (W.Va. Code § 6B-2-5(b)), and encourages members to contact the Ethics Commission to inquire about questionable situations in which recusal may still be warranted.

### **C. Participation in approval of Rules**

In furtherance of its statutory responsibilities, the Requester is required to draft and approve legislative rules. Although the Rules are generally procedural in nature, the Rules could potentially involve substantive technology determinations and policy decisions.

According to the Requester, none of the Council's Industry members has assisted in the preparation of the Rules to date. Instead, the council has utilized staff and an outside consultant to assist in the drafting of the Rules. The draft Rules are almost complete and will soon be placed on an agenda for discussion and approval. Therefore, the Requester desires guidance as to when, if at all, the Industry members should recuse themselves.

While the Requester desires a bright-line determination, the Commission is not in a position to assess whether each and every legislative rule is, or potentially could be, a prohibited conflict necessitating recusal. These are fact-specific determinations which require the Council, in consultation with its attorney, to consider on a case-by-case basis. Indeed, a Rule may seem obscure to the lay person yet provide a competitive advantage to a particular person or employer.

In light of such, the Commission believes the approach taken in Advisory Opinion 2009-08 represents the best model to avoid conflicts and maintain transparency. Specifically, the Commission finds that the Council's Industry members **may not** serve or participate on **committees** which initially drafts or evaluates the Council's legislative rules. An Industry member **may**, however, participate and vote on approval of the drafted Rules when they come before the full council, so long as the member does not have a specific prohibited financial interest or other conflict necessitating recusal. See W.Va. Code § 6B-2-5(j).

In the opinion of the Commission, it bolsters public confidence in the process if industry members are not on the committee which makes these initial determinations. Once the Rules are brought before the full governing body, still, there may be provisions in the Rule which affect an industry member's employer or business uniquely as opposed to affecting the employer or business as a class. In those situations, the affected member is still required to recuse him or herself.

Therefore, in answer to the question presented, the council's Industry members may not participate or serve on any committees which initially review, consider, or draft the council's legislative rules. However, the Industry-member may participate and vote on the approval of the proposed Rules, provided they do not have a specific prohibited financial interest or conflict in violation of the Ethics Act (e.g. approval of a Rule requiring a technical specification which only the member's employer can meet).

#### **D. Recusal**

Finally, the Commission reminds the Council members that under the Ethics Act, in order for "a public official's recusal to be effective, it is necessary to excuse him/herself from participating in the discussion and decision-making process by **physically removing him/herself from the room during the period, fully disclosing his interests,** and recusing him or herself from voting on the issue." W.Va. Code § 6B-2-

5(j)(3) (emphasis added). Additionally, the minutes/ record of the meeting must reflect the basis for the recusal and that the council member left the room during all consideration, discussion and vote on the item under consideration.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code § 6B-1-1, *et. seq.*, and does not purport to interpret other laws or rules. In accordance with W.Va. Code § 6B-2-3, this opinion has precedential effect and may be relied upon in good faith by other public agencies unless and until it is amended or revoked, or the law is changed.

\_\_\_S/S R. Kemp Morton, Chair\_\_\_  
R. Kemp Morton, Chairperson